



48 CFR Part 806

RIN 2900-AQ21

VA Acquisition Regulation: Competition Requirements

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: The Department of Veterans Affairs (VA) is amending and updating its VA Acquisition Regulation (VAAR) in phased increments to revise or remove any policy superseded by changes in Federal Acquisition Regulation (FAR), to move procedural guidance internal to VA into the VA Acquisition Manual (VAAM), and to incorporate any new agency specific regulations or policies. This rulemaking revises VAAR coverage concerning Competition Requirements.

DATES: This rule is effective on [Insert date 30 days after date of publication in the FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Mr. Rafael N. Taylor, Senior Procurement Analyst, Procurement Policy and Warrant Management Services, 003A2A, 425 I Street, NW, Washington, DC 20001, (202) 382-2787. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: These changes seek to align the VAAR with the FAR, remove outdated and duplicative requirements, and reduce burden on contractors. The VAAM incorporates portions of the removed VAAR as well as other internal agency procedural guidance. VA will rewrite certain parts of the VAAR and VAAM, and as VAAR parts are rewritten, VA will publish them in the Federal Register.

On February 1, 2019, VA published a proposed rule in the Federal Register (84 FR 1041) which announced VA's intent to amend regulations for VAAR Case RIN 2900-AQ21 – VA Acquisition Regulation: Competition Requirements. VA provided a 60-day comment period for the public to respond to the proposed rule and submit comments.

The comment period for the proposed rule ended on April 2, 2019, and VA received comments from six respondents. This rule adopts as a final rule the proposed rule published in the Federal Register on February 1, 2019, with the exception of minor formatting/grammatical edits and a few non-substantive edits, which are described below.

In particular, this final rule adds section 806.004-70, Definition, to establish that as used in part 806, “health-care resource(s)” has the same definition as that provided in VAAR 873.102.

This final rule adds subpart 806.1—Full and Open Competition, and section 806.102, Use of competitive procedures, to address the application of 38 U.S.C. 8127 to competitive General Services Administration (GSA) and VA Federal Supply Schedules.

This rule also adds subpart 806.2—Full and Open Competition After Exclusion of Sources, which contains two sections: 806.203, Set-asides for small business concerns, which directs attention to subparts 819.5 and 819.70 for VA’s policies on set-asides for small business concerns, and 806.270, Set-asides for verified Veteran-owned small businesses. This rulemaking, in section 806.270, sets forth VA’s authority under VA’s supplement to FAR part 6—VAAR part 806, and the requirement mandated by 38 U.S.C. 8127(d)—referred to as the VA Rule of Two, to conduct set-asides for Veteran-owned small businesses whenever market research provides the contracting officer with a reasonable expectation of receiving two or more offers/quotes from eligible and verified service-disabled veteran-owned small businesses (SDVOSBs) or veteran-owned small businesses (VOSBs), and award can be made at a fair and reasonable price that offers best value to the Government. This section also states that the requirement to set aside procurements for Veteran-owned small businesses applies to all contracts under this regulation, including orders under interagency acquisition vehicles such as the Federal Supply Schedules (FSS).

As a part of this rulemaking, subpart 806.3—Other Than Full and Open Competition, is revised to add specific reference to VA's authority for noncompetitive procedures for verified Veteran-owned small businesses and to clarify existing authorities regarding such noncompetitive procedures. The revised subpart also clarifies existing statutory authority for other VA unique authorities and updates new Title 41 citations and other specific citation requirements.

This final rule amends section 806.302, Circumstances permitting other than full and open competition, to add several sections. This rule also revises section 806.302-5, Authorized or required by statute, to remove its text and retain the title. The removed text has been revised and moved to section 806.302-571.

Under section 806.302-5, this final rule adds two sections: 806.302-570 and 806.302-571. Section 806.302-570, Noncompetitive procedures for verified Veteran-owned small businesses, provides coverage of the authority to enter into contracts non-competitively, when specifically authorized under the VA Veterans First Contracting Program in accordance with VAAR 819.7007 or 819.7008.

Section 806.302-571, Authorized or required by statute—VA unique authorities, contains the statutes previously listed in 806.302-5 and provides policy under the statutes to make awards by other than full and open competition. Paragraph (a) provides the updated Title 41 authority – 41 U.S.C. 3304(a)(5), updated from the moved coverage under 806.302-5. Paragraph (b)(1) provides that full and open competition is not required for the acquisition of prosthetic appliances and services based on the authority under 38 U.S.C. 8123. Paragraph (b)(2) provides the existing policy for the acquisition of commercial health-care resources, use of medical equipment or space, or research acquired from an institution affiliated with VA under the authority set forth in 38 U.S.C. 8153(a)(3)(A). Paragraph (b)(3) includes policy for the acquisition of commercial health-care resources, the use of medical equipment or space from other than an affiliated

institution, but only when conducted in accordance with simplified procedures in VAAR part 873, Simplified Acquisition Procedures for Health-Care Resources, under the authority set forth in 38 U.S.C. 8153(a)(3)(B). Paragraph (b)(4) provides the authority under 38 U.S.C. 8153(a)(3)(C)-(D) for the sole source acquisition of commercial health-care resources, the use of medical equipment or space, when not acquired from an affiliated institution in accordance with paragraph (b)(2).

Section 806.302-571, paragraph (c), requires that contracts awarded using the authority set forth under paragraph (a), with the exception of acquisitions authorized under paragraph (b)(2) of this section, shall be supported by the written justifications and approvals described in FAR 6.303 and 6.304.

Section 806.302-571, paragraph (d), incorporates an updated Title 41 citation reference: 41 U.S.C. 3304(a)(5); defines specific authorities that permit VA to procure certain supplies and services as sole source awards; and requires contracting officers, pursuant to FAR 6.302-5(c)(2)(ii), to comply with written justification and approval requirements set forth in FAR 6.303 and 6.304, citing 41 U.S.C. 3304(a)(5) and the applicable statute. Specifically, section 806.302-571(d) contains authorities previously under section 806.302-5 and continues existing policy to allow VA to enter into contracts for the cited types of supplies and services under this section.

This rulemaking removes section 806.302-7, Public interest, as it provides internal procedural guidance not having a significant effect beyond the internal operating procedures of the VA (see FAR 1.301(b)) and moves the coverage to the VAAM.

This final rule also removes section 806.304, Approval of the justification, as it provides internal procedural guidance not having a significant effect beyond the internal operating procedures of the VA (see FAR 1.301(b)) and which will be moved to the VAAM.

The proposed rule revised subpart 806.5—Competition Advocates to amend the title to “Advocates for Competition” to conform to the revised title in FAR part 6. The proposed rule also revised section 806.501, Requirement, to identify the Deputy Senior Procurement Executive as the VA Advocate for Competition. However, subsequent to publication of the proposed rule, VA organizational changes resulted in the need to update the title of who in VA is assigned the role of the VA Advocate for Competition. This is now updated in this final rule as described in item six in the Technical Non-Substantive Changes section of the preamble.

This final rule removes section 806.570, Planning requirements, as it provides internal procedural guidance not having a significant effect beyond the internal operating procedures of the VA (see FAR 1.301(b)) and the coverage has been moved to the VAAM.

VA provided a 60-day comment period for the public to respond to the proposed rule. As stated previously, VA received comments from six respondents.

A summary of the comments and the issues raised are provided as follows:

One commenter posted a general comment regarding advances in health care in what appears to be part of an academic exercise. VA appreciates the comment. As the comment does not specifically address issues with the proposed rule, VA is making no revisions as a result of the comment.

Another respondent suggests that moving items into the VAAM and eliminating Information Letters (ILs) and various procedural guidance is a positive move. They also note that the VAAM is a better alternative than continued reliance on sub-agency procurement manuals. VA appreciates the comment on the proposed rule. The VAAR/VAAM project objective is to remove procedural guidance that is internal to VA and move it into the VA Acquisition Manual (VAAM), and to incorporate any new agency specific regulations or policies. These changes seek to streamline and align the VAAR

with the FAR and remove outdated and duplicative requirements and reduce burden on contractors. The comment does not require the VA to make any revisions to the proposed rule.

The third commenter submits that the Class Deviations and other guidance issued by VA in response to the Supreme Court's decision in *Kingdomware Technologies, Inc. v. United States*, 136 S. Ct. 1969 (2016), recognize that the Javits-Wagner-O'Day Act's (JWOD) mandatory requirement to purchase from the Procurement List is capable of coexisting with the VA Rule of Two. The commenter states that the current guidance provides that the products and services on the AbilityOne Procurement List are mandatory sources but the VA Rule of Two is to be applied before adding new VA requirements to the Procurement List. To avoid any doubt that the February 9, 2018, class deviation is still in effect, the commenter urges the VA to clarify that VAAR 806.270 does not supersede VAAR 808.002 or the February 9, 2018, class deviation.

VA appreciates the comments. The respondent's comments concerning mandatory sources are appropriately addressed in the proposed rule pertaining to VAAR part 808 and related clauses and provisions. Since the rule (RIN 2900-AQ21) was published for public comment, new legislation impacting AbilityOne was signed into law on August 8, 2020 (see further description regarding this below and the class deviation to VAAR 808.002 issued on August 14, 2020, that addresses the priority of the AbilityOne program in relation to the Veterans First Contracting Program, with certain exceptions). As these comments do not pertain to the language and text in this rule for VAAR part 806, VA is making no changes based on these comments.

The fourth respondent also commented on this rule and its relation to AbilityOne, supporting the primacy of JWOD as a mandatory source and states that "this section of the VAAR should also recognize that non-mandatory source competition is not required where a mandatory source applies, and that the JWOD, and other statutes, direct

agencies to purchase certain products and services from mandatory sources.” The commenter also recommends revising the part to recognize that specified sources include the mandatory sources identified in FAR 8.002, 8.004, and subpart 8.7.

While VA appreciates the feedback from the respondents on this proposed rule, the Veterans First Contracting Program was updated as a result of amendments to 38 U.S.C. 8127 by Pub. L. 116-155, the Department of Veterans Affairs Contracting Preference Consistency Act of 2020, signed August 8, 2020, which requires the use of mandatory Government sources under the AbilityOne program for covered products and services except for certain previously awarded contracts to service-disabled veteran-owned small businesses (SDVOSBs) and veteran-owned small businesses (VOSBs) after December 22, 2006, and in effect August 7, 2020. This is implemented in VAAR 808.002(a)(1)(iv) and (a)(2). VA originally issued a Class Deviation on August 14, 2020, to make this change pending publication of a rule; this deviation was rescinded and replaced with Class Deviation from VA Acquisition Regulation part 808, Required Sources of Supplies and Services, dated July 20, 2021. The priorities for use of mandatory Government sources are covered by FAR part 8 and VAAR part 808, respectively. The language as set forth in VAAR part 806 and specifically at VAAR 806.270 fully comports with VA’s requirements under VAAR part 808. VA will not revise the final rule as a result of this comment. Note: VA is also planning an interim rule which would include a pointer at subpart 819.5 back to 808.002(a)(1)(iv) and (a)(2) regarding the AbilityOne program to ensure contracting officers and the public are reminded of the priority use of the AbilityOne program as set forth in VAAR 808.002.

The next respondent had multiple comments and the VA will address each in order. After first commending VA for its thoughtful development of the proposed rule, the commenter recommends that VAAR 806.501 be revised to include the actual list of Advocates for Competition. The commenter also states that VAAR 806.501 could be

further improved by including a requirement to identify the cognizant SBA Procurement Center Representative, the VA Ombudsman, and the VA Advocate for Competition in each solicitation above the simplified acquisition threshold.

VA has considered this suggestion but requiring each solicitation or contract to include a list is beyond the requirements of FAR 6.501 that VA is implementing at VAAR 806.501. However, VA is making available a complete list of VA procuring activity Advocates for Competition on its website that will be available when the final rule is published. Therefore, VA is making no changes to the proposed rule as a result of this comment.

The next comment recommended revisions to VAAR 806.270; specifically, that VAAR 806.270 be modified to exclude references to Class Deviation provisions and that VA remove the reference to “the VA Rule of Two (see 802.101)” from the final version of VAAR 806.270 as the definition of “VA Rule of Two” was not added to VAAR 802.101 via the required notice and public comment rulemaking process.

VA appreciates the comment and responds that the VA Rule of Two is a term that is defined and incorporated into 802.101 under a Class Deviation and it will be incorporated into part 802 as a part of a future proposed rule. Nevertheless, to avoid any confusion, section 806.270 has been revised to remove the reference, “see 802.101.”

The respondent also comments that the VAAR must fully implement the Vets Act Priority for SDVOSBs first, and then VOSBs. The commenter states VA should further explain how contracting officers give full credit and partial credit for VOSBs and to address its use in Lowest Priced Technically Acceptable (LPTA) procurements that do not permit tradeoffs. They believe that a new provision should be added to VAAR 852.215-70.

VA appreciates the comments. The respondent’s comments concerning 852.215-70 were appropriately addressed in the rule RIN 2900-AQ20 pertaining to VAAR part 815

and related clauses and provisions. Therefore, as these comments do not pertain to the language and text in this rule for VAAR part 806, VA is making no changes based on these comments. However, VA is clarifying section 806.270 to make clear that the statute's required set aside priorities are for SDVOSBs first, then VOSBs by adding the words "first, then..." after "(SDVOSBs)", and removing the word "and" so that it now reads, "...verified service-disabled Veteran-owned small businesses (SDVOSBs) first, then Veteran-owned small businesses (VOSBs)." This clarification is consistent with 38 U.S.C. 8127.

The same respondent recommends the proposed rule should be revised as a reference in the preamble of the proposed rule to additional internal requirements is problematic in their opinion. When VA issues the final rule, it should explain in the preamble that the only requirements for a VA contracting officer to issue a sole source contract under the Vets Act are as specified in the text of VAAR 806.302-570, and there are no unspecified agency procedures or class deviations that would restrict or water down this unique and important tool.

VA appreciates the opportunity to make clear the requirements of this section and what is set forth in the preamble. VA's internal procedures, including review and approval thresholds, are properly contained in the VAAM as authorized by FAR 1.301(a)(2) which authorizes an agency head to issue or authorize the issuance of internal agency guidance. While 38 U.S.C. 8127(c) provides the authority for when awards to such sole source concerns may be made, VA implements required internal review and approval oversight procedures as necessary. Therefore, VA makes no changes to the rule on the basis of these comments.

The same commenter asserts that VA should provide Contracting Officers guidance regarding what constitutes a fair and reasonable price.

VA notes that guidance on how to conduct a price analysis and establish a fair and reasonable price determination is already addressed in the FAR. Specifically, FAR subpart 15.4, Contract Pricing, provides guidance to contracting officers to assist in making a fair and reasonable price determination. Additional internal agency guidance would be contained in the VA Acquisition Manual. However, VA acknowledges this is an area of interest for the public as well as VA's acquisition workforce. VA is preparing additional internal training for its acquisition workforce to strengthen contracting officers' skillset in this area. VA is making no changes to the rule based on these comments.

The same commenter recommends VA revise VAAR 806.302-570(a) to state that the sole source contract shall be supported "by the applicable justification and approval requirements of FAR 6.302-5(c)(2)(ii), 6.303, and 6.304."

VA has considered the comment and concurs that the VA legislation provides a unique sole source authority that is less restrictive than a sole source award otherwise permitted under FAR 6.302-1, "Only one responsible source and no other supplies or services will satisfy agency requirements." Accordingly, section 806.302-570(a) has been revised to add the word "applicable" as noted in the amendatory language with respect to the content of the justification requirements.

The next comment takes issue with the language "without regard to any other provision of law" in VAAR 806.302-571(b)(1) and believes that the other proposed sections of this rule may create confusion as to whether this sole source authority trumps the Vets Act requirements for VA to give priority to SDVOSBs and VOSBs in all VA contracts. They go on to state, "The sole source authorities cited in VAAR 806.302-571 do not trump the VA's obligations under the Vets Act. For example, 38 U.S.C. § 8123 provides, permissively, that VA may procure prosthetic appliances . . . without regard to any other provision of law." They submit that by contrast, the Vets Act includes broader language that mandates VA give priority to SDVOSBs and VOSBs.

VA does not concur with the respondent's assessment and will make no change based on these comments. The legislative language provides VA broad discretion in certain types of procurements "without regard to any other provision of law."

The last respondent provides the following positive comments regarding the proposed rule: "... strongly supports the VA in their efforts to create more flexibility in the contracting process as well as efforts to reorganize the community care programs through the MISSION Act of 2018."

VA appreciates the comment. The comment does not require VA to make any revisions to the proposed rule as the comments do not apply to this rule.

Technical Non-Substantive Changes to the Proposed Rule

This rule makes six non-substantive changes to the proposed rule to provide clarity, eliminate confusion, and to ensure compliance with statute and VA's authority.

1. Under section 806.270, Set-asides for verified Veteran-owned small businesses, VA has revised the language to remove the phrase "including Governmentwide acquisition contracts (GWACs)" as unnecessary to set forth specifically further types of contract vehicles.

2. Under section 806.302-571, Authorized or required by statute—VA unique authorities, VA has revised the language in paragraph (b)(1) to remove the phrase at the end of the subparagraph: "as set forth in VA directives governing prosthetic appliances, sensory aids and services supporting the same..." as unnecessary. VA contracting officers are already required to follow VA directives and are internal operating procedures.

3. Under section 806.302-571, paragraph (b)(2), VA is revising the language to provide clarity by: adding “Acquisition of resources from” in the first sentence before “medical practice groups” and to remove “affiliated” before “institution affiliated with VA.”

4. Under section 806.302-571, at paragraph (b)(3), VA is removing the phrase “only if the procurement is conducted” as too restrictive to VA’s procurement authority in various statutes and to ensure clarity. In paragraph (b)(4), VA is revising the authority citation at the end of the paragraph to add “(D)” at the end so that it now reads: (38 U.S.C. 8153(a)(3)(C)-(D)).

5. Under section 806.302-571, paragraph (c), VA is making minor grammatical edits to provide clarity by revising the first sentence so that “this authority” now reads “an authority” and by adding the words, “in this section” so that the intro to the sentence now reads: “Contracts awarded using an authority in this section,...”.

6. Under subpart 806.5, Advocates for Competition, and the underlying section 806.501, Requirement, the section is updated to reflect a new organization role and title, to clarify the authority to appoint an alternate agency advocate for competition, and add the requirement to designate procuring activity advocates for competition in accordance with FAR 6.501. The section has been updated to remove the title of Deputy Senior Procurement Executive (DSPE) to reflect the official organizational title of the Associate Executive Director, Office of Procurement Policy, Systems and Oversight (AED/PPSO) and to add “for the agency” after the phrase “VA Advocate for Competition.” The delegated authority is clarified that the AED/PPSO may further delegate the authority to appoint an alternate agency advocate for competition, and to add “shall designate procuring activity advocates for competition in accordance with FAR 6.501.”

Executive Orders (EOs) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts, and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. The Office of Information and Regulatory Affairs has determined that this rule is not a significant regulatory action under Executive Order 12866. The Regulatory Impact Analysis associated with this rulemaking can be found as a supporting document at www.regulations.gov.

Paperwork Reduction Act

This final rule contains no provisions constituting a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3521).

Regulatory Flexibility Act

The Secretary hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act (5 U.S.C. 601-612). The rule primarily affects the use of authorities that VA contracting officers are already authorized by statute to utilize when required and in accordance with existing agency regulation, policies and procedures. This rule appropriately clarifies and revises the use of such authorities and when certain justification and approval requirements apply. The authorities were previously codified in the VAAR either in this part or in other parts, to include those affecting small business programs, and they affected both large and small entities alike. With this rule, VA ensures content to supplement the FAR for VA's unique service-disabled veteran-owned

small business and veteran-owned small business program is properly implemented in this part.

The overall impact of the rule is of benefit to small businesses owned by Veterans or service-disabled Veterans as the VAAR is being updated to remove extraneous procedural information that applies only to VA's internal operating processes or procedures. This rule will ensure clarity for both the public and VA contracting officers to ensure that when such authorities are utilized, they are properly cited and, when required, appropriately documented and publicized. This rulemaking does not change VA's policy regarding small businesses. VA estimates that no cost or economic impact to individual businesses will result from this rule update. VA estimates this final rule is not expected to result in increased or decreased costs to small business entities, and no more than *de minimis* costs. On this basis, the final rule does not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. Therefore, pursuant to 5 U.S.C. 605(b), the initial and final regulatory flexibility analysis requirements of 5 U.S.C. 603 and 604 do not apply.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and tribal Governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any one year. This final rule will have no such effect on State, local, and tribal Governments or on the private sector.

Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 et seq.), the Office of Information and Regulatory Affairs designated this rule as not a major rule, as defined by 5 U.S.C. 804(2).

List of Subjects in 48 CFR Part 806

Government procurement.

Signing Authority

Denis McDonough, Secretary of Veterans Affairs, approved this document on September 1, 2021, and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs.

Luvenia Potts,
Regulations Development Coordinator,
Office of Regulation Policy & Management,
Office of General Counsel,
Department of Veterans Affairs.

For the reasons set forth in the preamble, VA revises 48 CFR part 806 to read as follows:

PART 806—COMPETITION REQUIREMENTS

Sec.

806.004-70 Definition.

Subpart 806.1—Full and Open Competition

806.102 Use of competitive procedures.

Subpart 806.2—Full and Open Competition After Exclusion of Sources

806.203 Set-asides for small business concerns.

806.270 Set-asides for verified Veteran-owned small businesses.

Subpart 806.3—Other Than Full and Open Competition

806.302 Circumstances permitting other than full and open competition.

806.302-5 Authorized or required by statute.

806.302-570 Noncompetitive procedures for verified Veteran-owned small businesses.

806.302-571 Authorized or required by statute—VA unique authorities.

Subpart 806.5—Advocates for Competition

806.501 Requirement.

Authority: 40 U.S.C. 121(c); 41 U.S.C. 1121(c)(3); 41 U.S.C. 1303; 41 U.S.C. 1702; 41 U.S.C. 3304; and 48 CFR 1.301 through 1.304.

806.004-70 Definition.

As used in this part—

Health-care resources has the same definition as that provided in 873.102.

Subpart 806.1—Full and Open Competition

806.102 Use of competitive procedures.

(d)(3) Awards made using General Services Administration (GSA) or Department of Veterans Affairs (VA) Federal Supply Schedules (FSS) are considered competitive when awarded in accordance with the procedures specified in FAR part 8 and this part.

Subpart 806.2—Full and Open Competition After Exclusion of Sources

806.203 Set-asides for small business concerns.

(c) Subparts 819.5 and 819.70 prescribe the policies and procedures that shall be followed with respect to set-asides for small business and Veteran-owned small business concerns.

806.270 Set-asides for verified Veteran-owned small businesses.

(a) To fulfill the statutory requirements relating to Public Law 109-461, the Veterans Benefits, Health Care and Information Technology Act of 2006 (38 U.S.C. 8127-8128), contracting officers shall set aside solicitations in accordance with subpart 819.70 and the VA Rule of Two for Vendor Information Pages (VIP) verified service-disabled Veteran-owned small businesses (SDVOSBs) first, then Veteran-owned small businesses (VOSBs) (see 819.7005 and 819.7006). (38 U.S.C. 8127-8128)

(b) The requirement in this section to set aside procurements for VIP verified SDVOSBs and VOSBs applies to all types of contracts, including orders placed under GSA's Federal Supply Schedules (FSS) and indefinite-delivery contracts. (38 U.S.C. 8127-8128)

Subpart 806.3—Other Than Full and Open Competition

806.302 Circumstances permitting other than full and open competition.

806.302-5 Authorized or required by statute.

806.302-570 Noncompetitive procedures for verified Veteran-owned small businesses.

(a) *Sole source awards made to a verified SDVOSB or VOSB.* Full and open competition need not be provided for when awarding a sole source contract under paragraph (b) or (c) of this section, to a verified SDVOSB or VOSB in accordance with 819.7007 or 819.7008, respectively, as authorized. Contracts awarded using the

authority in this paragraph (a) shall be supported by the applicable justification and approval requirements of FAR 6.302-5(c)(2)(ii), 6.303, and 6.304.

(b) *Sole source awards below the simplified acquisition threshold.* (Citation: 41 U.S.C. 3304(a)(5), as authorized by 38 U.S.C. 8127(b)). A contracting officer may award a contract under the authority in this paragraph (b) to a VIP verified SDVOSB first, then VOSB if no SDVOSBs can fulfill the need, for an amount less than the simplified acquisition threshold, using procedures other than full and open competition. (38 U.S.C. 8127)

(c) *Sole source awards above the simplified acquisition threshold.* (Citation: 41 U.S.C. 3304(a)(5), as authorized by 38 U.S.C. 8127(c)). A contracting officer may award a contract to a VIP verified SDVOSB first, then VOSB if no SDVOSB can satisfy the need, using procedures other than full and open competition when—

(1) Such concern is determined to be a responsible source with respect to performance of such contract opportunity;

(2) The anticipated award price of the contract (including options) will exceed the simplified acquisition threshold, but will not exceed \$5 million; and

(3) Contract award can be made at a fair and reasonable price that offers best value to the United States. (38 U.S.C. 8127)

806.302-571 Authorized or required by statute—VA unique authorities.

(a) *Authority.* (1) Citation: 41 U.S.C. 3304(a)(5). Contracting officers shall also cite the specific authorities in paragraph (b) of this section for the statutes related to the products and services procured.

(2) Full and open competition need not be provided for when a statute expressly authorizes or requires that the acquisition be made through another agency or from a specified source.

(b) *Application.* The following products and services are authorized to be acquired from a specified source:

(1) *Prosthetic appliances and services.* Contracting activities may procure prosthetic appliances and necessary services required in the fitting, supplying, and training and use of prosthetic appliances by purchase, manufacture, contract, or in such other manner as determined to be proper, without regard to any other provision of law. (38 U.S.C. 8123)

(2) *Commercial health-care resources, the use of medical equipment or space, or research, and acquired from an institution affiliated with the Department of Veterans Affairs.* Contracting activities may procure health care resources, including resources from medical practice groups and other approved entities associated with affiliated institutions, blood banks, organ banks, or research centers from an institution affiliated with VA in accordance with 38 U.S.C. 7302. Acquisition of resources from medical practice groups and other entities shall be approved when determined by the contracting activity to be legally associated with affiliated institutions in accordance with 38 U.S.C. 7302. The justification and approval requirements of FAR 6.303 and paragraph (c) of this section do not apply. (38 U.S.C. 8153(a)(3)(A))

(3) *Commercial health-care resources, the use of medical equipment or space, and is not to be acquired from an entity described in paragraph (b)(2) of this section.* Contracting activities may procure health care resources from a non-affiliated institution in accordance with the simplified procedures prescribed in part 873. The justification and approval requirements of FAR 6.303 shall apply. (38 U.S.C. 8153(a)(3)(B))

(4) *Commercial health-care resources, the use of medical equipment or space, when not acquired from an affiliated institution described in paragraph (b)(2) of this section and to be conducted on a sole source basis.* The authority in this paragraph (b)(4) applies if not acquired from an affiliated institution in accordance with part 873.

The justification and approval requirements of FAR 6.303 shall apply. (38 U.S.C.

8153(a)(3)(C)-(D))

(c) *Written justifications and approvals.* Contracts awarded using an authority in this section, with the exception of acquisitions authorized under paragraph (b)(2) of this section, shall be supported by the written justifications and approvals described in FAR 6.303 and 6.304.

(d) *Citation of specific authorities.* When a contracting officer enters into a contract without providing full and open competition for any of the following items or services, the contracting officer must cite 41 U.S.C. 3304(a)(5) and the following authorities that apply, in the written justifications and approvals as required by FAR 6.303 and 6.304:

(1) *Contracts for scarce medical specialist services.* (Citation: 41 U.S.C. 3304(a)(5), as authorized by 38 U.S.C. 7409.) Contracting officers may enter into contracts with:

(i) Schools and colleges of medicine, osteopathy, dentistry, podiatry, optometry, and nursing;

(ii) Clinics; and

(iii) Any other group or individual capable of furnishing such scarce medical specialist services at VA facilities, to include the services of physicians, dentists, podiatrists, optometrists, chiropractors, nurses, physician assistants, expanded-function dental auxiliaries, technicians, and other medical support personnel. (38 U.S.C. 7409)

(2) *Contracts or agreements to purchase or sell merchandise, equipment, fixtures, supplies and services for the operation of the Veterans Canteen Service.* (Citation: 41 U.S.C. 3304(a)(5), as authorized by 38 U.S.C. 7802(f).) Contracts or agreements may be entered into without regard to 41 U.S.C. 6101(b) through (d).

(3) *Contracts or leases for the operation of parking facilities established under authority of 38 U.S.C. 8109(b).* (Citation: 41 U.S.C. 3304(a)(5), as authorized by 38

U.S.C. 8109(f).) Contracts or leases may be entered into provided that the establishment, operation, and maintenance of such facilities have been authorized by the Secretary or designee.

(4) Contracts for laundry and other common services, such as the purchase of steam, negotiated with non-profit, tax-exempt educational, medical, or community institutions. (Citation: 41 U.S.C. 3304(a)(5), as authorized by 38 U.S.C. 8122(c).)

Contracts may be entered into when specifically approved by the Secretary or designee and when such services are not reasonably available from private commercial sources.

(5) Contracts or agreements with private or public agencies or persons for translator services. (Citation: 41 U.S.C. 3304(a)(5), as authorized by 38 U.S.C. 513.)

Subpart 806.5—Advocates for Competition

806.501 Requirement.

The Associate Executive Director, Office of Procurement Policy, Systems and Oversight (AED, PPSO) is designated as the VA Advocate for Competition for the agency. The AED, PPSO may further delegate the authority in this section to appoint an alternate agency advocate for competition and shall designate procuring activity advocates for competition in accordance with FAR 6.501. A complete list of VA procuring activity advocates for competition can be found at <https://www.va.gov/oal/business/pps/competition-advocates.asp>.